Supreme Court, U.S.
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85-1159

No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1985

EXXON SHIPPING COMPANY,
a Delaware corporation,

Petitioner,

v.

OLGA L. COOK,
Personal Representative of the Estate of
ROBERT C. COOK, Deceased,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

In 1972 Congress amended the Longshoremen's and Harbor Workers' Compensation Act to relieve a vessel owner of any liability to an injured harbor worker when the cause of the injury was the

> ". . . negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel . . . shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred." 33 U.S.C. § 905(b).

Thus Congress abolished the doctrine of unseaworthiness for hazardous conditions created by shipyard workers.

This Court, in *Scindia Steam Nav. Co., Ltd.* v. *De Los Santos*, 451 U.S. 156 (1981), approved certain principles to be applied when determining whether a vessel may be held liable for injury to the employee of an independent contractor[1] under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act. Among those principles are:

1. A vessel or shipowner has no general duty by way of supervision or inspection to exercise reasonable

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[1] The *Scindia* decision involved the vessel's duties to a stevedore and its employees. In the present case the District Court and the Court of Appeals held the same principles applicable to an action against the vessel for injury to the employee of a shipyard, also an independent contractor (App-A-3, C-5, E-2); see *Hill* v. *Texaco, Inc.*, 674 F.2d 447, 451, *reh'g. denied* (5th Cir. 1982).

care to discover dangerous conditions that develop within the confines of operations which have been assigned to the independent contractor. 451 U.S. at 172.

2. As a general matter, the shipowner may rely on the independent contractor to perform its duty to provide its employees with a safe place to work and to take necessary safeguards against hazards of the work. 451 U.S. at 169-70, 172.

3. The vessel may be liable if it actively involves itself in the independent contractor's operations and negligently injures an employee of the independent contractor. 451 U.S. at 167.

4. The vessel has a duty to warn the independent contractor of hidden dangers. 451 U.S. at 167.

The issue presented in this case is whether, under a proper application of the *Scindia* principles, a vessel owner can be held liable for negligence within the terms of the Act when the uncontroverted evidence establishes that injury and death of a shipyard worker is caused by the shipyard's failure to follow its own safety procedures after the work area has been released to the shipyard by the vessel owner's repair superintendent under the following circumstances:

1. The vessel owner's representative, by written specification, calls for the shipyard to make certain repairs to the vessel, the specification includes a direction to "crop out" or "burn out" a portion of the deck, and that specification is later repeated orally;

2. Injury results when the shipyard, in performing that repair, fails to follow its usual safety procedures for preparing and performing "hot work";

3. The vessel justifiably relied on the shipyard to follow its own safety procedures and there is no evidence that the vessel knew or had any reason to know that the shipyard would not follow them; and

4. It has been conclusively established that the vessel performed its duty to warn the shipyard of the vessel's condition.

PARTIES

Petitioner Exxon Shipping Company, a Deleware corporation, and respondent Olga L. Cook, Personal Representative of the Estate of Robert C. Cook, Deceased, were the only parties to the proceedings in the United States Court of Appeals for the Ninth Circuit. Humble Oil & Refining Corporation, a Delaware corporation, was a co-defendant in the United States District Court for the District of Oregon, but the action was dismissed as to that party and it did not participate in the appeal (App. A-2, E-1).

Petitioner is a wholly-owned subsidiary of Exxon Corporation, a New Jersey corporation. It has no corporate affiliates or subsidiaries.

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DECISIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported at 762 F.2d 750, as amended by an opinion on rehearing reported at 773 F.2d 1001. Those opinions are reproduced as Appendices A and B. For the Court's convenience, the opinion as amended is reproduced as Appendix E.

The decision of the United States District Court for the District of Oregon was not reported. Its opinion is reproduced as Appendix C.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its decision on rehearing on October 10, 1985, which decision amended its prior decision of June 3, 1985. This court has jurisdiction to review by certiorari the decision of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case is governed by the provisions of 33 U.S.C. § 905(b), which provides:

> "(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. . . . If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel

under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under the chapter."

STATEMENT OF THE CASE

1. *Introduction.*

On August 12, 1982, Robert C. Cook was fatally injured in an explosion while working aboard the vessel EXXON NEW ORLEANS as an employee of Northwest Marine Ironworks ("Northwest Marine"), a shipyard which had contracted to perform repairs to the vessel. This is an action by his personal representative ("plaintiff") against the vessel owner ("Exxon") for damages for wrongful death which resulted when shipyard employees cut into a fuel tank and caused an explosion.

The United States District Court for the District of Oregon granted summary judgment for Exxon, holding that plaintiff had not produced evidence to create a triable issue of fact on either of two alleged violations of the vessel's duties. Specifically, the district court held there was no evidence that Exxon had failed to warn Northwest Marine of a hidden danger or defect (App. C-6) and there was no evidence that Exxon's representative had actively involved himself in the ship repair operations (App. C-7).

The United States Court of Appeals for the Ninth Circuit held that the evidence before the court on summary judgment conclusively established that Exxon had performed its duty to warn Northwest Marine of the condition of the vessel (App. B-2, E-4), but that there was evidence from which a jury could find that Exxon's representative had actively involved himself in the repair operations (App. B-3, E-5, 6).

2. *Statement of Facts.*

In 1982 the vessel EXXON NEW ORLEANS put into Northwest Marine's shipyard in Portland, Oregon, for a regular biennial inspection and for repairs (CR 38, King Depo. 23). Northwest Marine had contracted to perform work at a total price of approximately two million dollars (CR 38, King Depo. 31). It provided about three hundred workers on each of two shifts to accomplish the work (CR 38, King Depo. 31, 34). Northwest Marine provided its own general superintendent (Mr. Sheridan), its own marine chemist and safety inspector (Mr. Flynn), its own production foreman (Mr. Leggett), its own estimator and project manager (Mr. Smith), and its own foremen and leadmen.

Exxon's representative was John H. King, Jr., a "repair superintendent" or "owner's representative." His job was to determine the repairs to be done, to inspect the work to see that specifications had been carried out, and to work with Northwest Marine's superintendent, Mr. Sheridan (CR 38, King Depo. 33-

34; Smith Depo. 21-23; CR 30, Sheridan Depo. 9). Mr. Sheridan himself coordinated the work of the shipyard's employees; he testified that Mr. King worked "through" him on matters involving work scope or work items and that Mr. King's primary job was that of inspector (CR 30, Sheridan Depo. 9).

In preparation for turning the vessel over to Northwest Marine for repairs, Mr. King had prepared a list of items for repair (CR 38, King Depo. 25-26). One of those items was "Item No. 68" which had been drawn up about a month before the ship was turned over to Northwest Marine (CR 38, King Depo. 38). Item No 68 reads:

> "*Deck Penetration fwd stm and exh Lines 626*
>
> HOLD UNTIL AUTHORIZED [2]
>
> Provide labor, material and equipment to crop out and renew steel deck plating 3/4" by approx. 16 sq. ft. with 3 pipe penetrations. 1-10" main stm. line, 1-14" exh line, 1-5" Fwd stm line. Replace piping using new gaskets and bolting." (CR 38, King Ex. 2)

Shipyard employees understood the work order to mean that a portion of the decking was to be burned out and removed (CR 38, Hines Depo. 6).

Mr. King discussed this work item with employees of Northwest Marine on several occasions. He pointed

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[2] The shipyard understood that the owner's decision to have this work done was pending (CR 30, Sheridan Depo. 17, 37-39).

out to shipyard personnel, at their request, the general area where the work was to be done (CR 30, Sheridan Depo. 40-41; CR 32, Hines Depo. 8), he authorized the shipyard to do some preliminary work so that the area could be seen more clearly (CR 32, Hines Depo. 9; CR 30, Sheridan Depo. 42), then examined it again and decided that the pipes themselves would not have to be replaced and that the doublers, or flanges surrounding the pipes, should be saved (CR 30, Sheridan Depo. 43-44; CR 35, Krause Depo. 31). Having made those decisions, he authorized the shipyard to proceed with the work (CR 38, King Depo. 47-48). Mr. Sheridan then issued the shipyard's "Release Work Order" (*id.*).

Mr. Sheridan's immediate subordinate with respect to Work Item No. 68 was a foreman, Mr. Hines (CR 38, Hines Depo. 3-4). Mr. Krause, a boilermaker, was the shipyard's "lead man" working under Mr. Hines (CR 35, Krause Depo. 4, 16).

Prior to Mr. King's final authorization to proceed with the work, Mr. Hines and Mr. Krause had discussed the job between themselves and Mr. Hines told Mr. Krause to cut the pipes above and below deck and remove the doublers with a "carbon arc" in order to save the doublers (CR 35, Krause Depo. 26). Their understanding was that by using a "carbon arc" they could cut through the weld without cutting through the deck itself (CR 35, Krause Depo. 17, 27). An alternative method is to cut with a torch which will penetrate the deck (CR 35, Krause Depo. 17). There is no evi-

dence that Mr. King was aware of these discussions.

It was after those discussions, at which Mr. King was not present, that Mr. King spoke once again to shipyard personnel about Item No. 68. During a conversation among Mr. King, Mr. Sheridan, and Mr. Krause, according to Mr. Krause:

"Q Was a description of the work changed from removing the pipe?

"A Yes, it was changed.

". . . . .

"Q How did it change?

"A How did it change? It changed from air arc the doubler out to burning it out, cutting it out.

"Q And how did you become aware of that change?

"A By Mr. King.

"Q What did he tell you?

"A He told me to burn the doubler out and save the flange or save the doubler.

"Q All right. Did Mr. King say anything else to you at that time?

"A No, just remove the doubler and cut around the doubler and pointed with his finger and said, 'The third one, crop it out the best way you know how.'" (CR 35, Krause Depo. 31).

Mr. Sheridan testified that during that conversation "it was decided that we would cut around the doubler" on the two largest pipes (CR 30, Sheridan Depo. 43-44).

Northwest Marine had specific procedures to be followed by its employees before any "hot work" such as cutting through a deck with a torch was performed. According to undisputed evidence, when hot work is to be done on deck a pipefitter or a boilermaker must determine from below deck where the hot work will penetrate (CR 30, Sheridan Depo. 10-11, 13, 15). This requires that measurements be taken and that drawings be checked (*id.*). Whether a hazard exists cannot be determined until this is done.

If there is any suspicion of a hazard such as an explosive condition, the responsible craft foreman or leadman calls the marine chemist (*id.* 12). Before hot work is done the craft foreman must check the marine chemist's certificates to be sure the area involved is safe for hot work (*id.* 13-14). Before the hot work actually begins, the leadman is to again check the area for hazards; if none are found, he then issues a "Hot Work Certificate" (*id.* at 14).

The shipyard's marine chemist, Mr. Flynn, testified that he knew there was a fuel tank adjacent to or near the pipe tunnel below deck (CR 30, Flynn Depo. 19-20) and that if he had been informed that hot work was to be performed in connection with Work Item No. 68:

> ". . . I would have gone down into the pipe tunnel and after having measured from the pipe

> out to the edge of the doubler, transferred that from the inside, and I would have seen if that would have fallen totally within the pipe tunnel.
>
> "If it had fallen totally within the pipe tunnel, I would have said that they could have done it and issued a Certificate, and in this particular case it did not obviously fall totally within the pipe tunnel and so I would have not have [sic] issued a Certificate that they could have done that work exactly as they did it.
>
> "I may have told them how they could accomplish basically the same thing without cutting directly into the bunker tank." (CR 34, Flynn Depo. 25-26)

The shipyard failed to follow its safety procedures in this case. Mr. Hines, the foreman, intended to come back before the hot work was done to take the necessary measurements below deck because it was part of his job to see that proposed hot work was laid out properly (CR 32, Hines Depo. 25, 31-33). However, Mr. Krause and other Northwest Marine employees proceeded with the hot work before anyone had taken steps to lay the job out from below deck and without taking such steps themselves (CR 35, Krause Depo. 37-39). As a result, there was an explosion when Mr. Stone, a Northwest Marine employee, was using a torch to burn around the doublers surrounding the pipes and, in the process, penetrated a fuel tank [3] which was adjacent to the

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[3] Both of the courts below held that Exxon had conclusively established that it performed any duty which it might have had to warn Northwest Marine of the location of the fuel tank. *See* App. B-2, C-6, E-4.

below-deck pipe tunnel (CR 38, Stone Depo. 30; CR 35, Krause Depo. 50-51). Mr. Cook, who had been assigned to "fire watch" in the pipe tunnel, died as a result of injuries received in that explosion.

Mr. King was not aboard the vessel at the time of the explosion. He had not known the work on Item No. 68 was to be performed that day (CR 38, King Depo. 48, 53, 60-61). He did not know that the shipyard intended to begin work on that item without first laying out the job properly and calling for the marine chemist, if necessary; he had no reason to anticipate that Northwest Marine employees would proceed with that work without following their usual safety procedures.

BASIS FOR FEDERAL JURISDICTION

This is a case arising under a statute of the United States, 33 U.S.C. § 905. The district court had jurisdiction pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and 28 U.S.C. § 1333 (maritime jurisdiction) and 33 U.S.C. § 933 (Longshoremen and Harborworker's Compensation Act). The district court's jurisdiction was also invoked under 28 U.S.C. § 1332 (diversity of citizenship; amount in controversy exceeding $10,000).

PRAYER

Petitioner, Exxon Shipping Company, a Delaware corporation, petitions this court to issue its writ of

certiorari to the United States Court of Appeals for the Ninth Circuit and to review and reverse that court's decision holding that petitioner was not entitled to summary judgment.

REASONS FOR GRANTING CERTIORARI

The United States Court of Appeals for the Ninth Circuit has decided this case in a way which is in conflict with this Court's analysis in *Scindia Steam Nav. Co., Ltd.* v. *De Los Santos*, 451 U.S. 156 (1981). In the alternative, if the Court determines that the issue presented in this case was not decided in petitioner's favor in *Scindia*, then the issue presented is one which has not been, but ought to be, settled by this Court.

ARGUMENT

In *Scindia Steam Nav. Co., Ltd.* v. *De Los Santos*, 451 U.S. 156 (1981) this court discussed the circumstances under which a vessel may be held liable for injuries to a longshoreman despite the provision in 33 U.S.C. § 905(b) that the vessel shall not be liable except for its own negligence. One of the circumstances described, but not discussed in detail, in *Scindia*, was the "accepted" principle that

> ". . . the vessel may be liable if it actively involves itself in the cargo operations and negligently injures a longshoreman . . ." 451 U.S. at 167.

The issue presented by this case is what can, as a mat-

ter of law, be considered to be active involvement by the vessel in the work of an independent contractor.

In this case, the independent contractor's work was the performance of extensive repairs to the vessel. At the time of the injury the vessel had been turned over to the shipyard and was in dry-dock actually undergoing repairs. The vessel maintained an owner's representative on duty during these repairs. His job was to be a liaison between the vessel and the shipyard's supervisor, to inspect the repairs, and to answer questions about the work to be done. The actual supervision of the repair crew of approximately 600 persons was done by shipyard personnel, not by the owner's representative. There is no evidence that the owner's representative engaged in supervision of shipyard personnel as a matter of practice.

Nevertheless, the United States Court of Appeals for the Ninth Circuit held, on review of summary judgment for the vessel, that there was evidence from which a finder of fact could determine that the vessel had actively involved itself in the shipyard's work and negligently injured Mr. Cook. Its decision must necessarily have been based on the actions of Mr. King with respect to Work Item 68, described at pages 6-7, *supra*. That evidence was not adequate to permit a finding of active involvement in the shipyard's work. If it was, then this Court's determination in *Scindia* that the vessel is entitled to rely on the independent contractor to carry out its work with proper provision

for the safety of its workers [4] is meaningless. The Ninth Circuit's holding permits liability without fault, contrary to Congressional intent.

What the owner's representative in this case did with respect to Item No. 68 was simply to prepare the original work order which called for a portion of the deck to be "cropped out," to point out to shipyard personnel, at their request, the actual portion of the deck referred to in the work order where repairs were necessary, and to tell the shipyard's superintendent and lead man to save the doubler.

There is, moreover, no evidence that the owner's representative played any other part in the events leading up to the accident. He was not aboard the ship at the time of the explosion, did not know that the work on Item No. 68 was to be done on that day, did not urge that it be done at any particular time, and had no part in the shipyard's failure to perform its normal safety procedures.

Those safety procedures are among the things which the vessel owner is entitled, under this court's analysis in *Scindia*, to assume that the independent contractor will perform unless the vessel has reason to believe otherwise:

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[4] "The 1972 Amendments . . . rejected the notion of a nondelegable duty on the shipowner to provide a safe place to work and did not undermine the justifiable expectations of the vessel that the stevedore would perform with reasonable competence and see to the safety of the cargo operations." 451 U.S. at 172.

"As a general matter, the shipowner may rely on the stevedore to avoid exposing the longshoremen to unreasonable hazards. . . ." 451 U.S. at 170.

". . . The shipowner, within limits, *is* entitled to rely on the stevedore, and owes no duty to the longshoremen to inspect or supervise the cargo operations. . . ." 451 U.S. at 172. [Emphasis by the Court.]

". . . Only where the judgment of the stevedore is 'obviously improvident,' . . ., and this poor judgment either is known to the shipowner or reasonably should be anticipated under the circumstances, does the shipowner have a duty to intervene. . . ." 451 U.S. at 180 (concurring opinion of Mr. Justice Powell). And see footnote 4, *supra*.

Decisions from other Courts of Appeals illustrate the proper application of the *Scindia* principles. For example, in *Hill* v. *Texaco, Inc.*, 674 F.2d 447, *reh. denied* (5th Cir. 1982) the vessel had hired the shipyard to determine the effect of rust on the walls of a gasoline storage tank aboard the vessel. A shipyard worker fell and was injured when he slipped on the loose rust in the tank while he was not wearing a safety belt or safety lines. The district court found the vessel negligent because it had not ensured that the employee used proper safety equipment when climbing the tank walls. The Fifth Circuit reversed. There was, the court noted, no evidence that the ship's crew participated in or supervised the injured employee's work, and no evidence that the ship had asked the shipyard

what safety equipment was used. Under *Scindia*, the court said, the vessel's duty to protect the independent contractor's employees arises only if the vessel is aware that the ship or its gear poses a danger to the employees *and* if the vessel also learns that the independent contractor is acting unreasonably in failing to protect its employees against that danger. 674 F.2d at 451. Evidence that three hours before the accident the ship's mate saw the shipyard's employees on deck and did not notice any safety equipment would not, the court held, permit an inference that he knew none was being used at the time of the injury. 674 F.2d at 449.

The *Hill* analysis has been followed by the Fifth Circuit in *DuPlantis* v. *Zigler Shipyards, Inc.*, 692 F.2d 372 (5th Cir. 1982) and *Stass* v. *American Commercial Lines, Inc.*, 720 F.2d 879 (5th Cir. 1983) *reh. denied* (1984). In *Stass* a shipyard worker was injured when he slipped and fell on sprouted grain in the area where he was working. The evidence established that it was part of the shipyard's normal procedures to clean the ship before the repair procedures began. There was, the court held, no basis upon which to find the vessel negligent:

> "In short, cleaning the areas to be repaired on incoming barges was, as in *Duplantis*, 692 F.2d at 375, simply 'a necessary first step in doing the work,' and the slippery footing caused by the sprouts was a risk 'inherent in the carrying out of the contract for repairs, *West* [v. *United States*, 361 U.S. 118] at 123, 80 S. Ct. at 193; *Hill*, 674

> F.2d at 452. In turning over Barge 920, ACL could rely on Louisiana Dock to perform its repair job properly, *De Los Santos*, 451 U.S. at 170, 101 S. Ct. at 1623. . . . Louisiana Dock policy was always to open doors on only one side of a barge, close them after any inspection . . . and then open the doors on the other side of the barge. *Had Louisiana Dock required its own policy to be followed, Stass would not have been injured.*" 720 F.2d at 884. [Emphasis added.]

In this case, as in *Stass*, the shipyard failed to perform what was a necessary first step in doing the work. In this case, as in *Stass*, if the shipyard had required that its own policies be followed, the injury would not have occurred. *See, also, Spence* v. *Mariehamns R/S*, 766 F.2d 1504 (11th Cir. 1985), clearly upholding the vessel's right to rely on the independent's contractor's expertise and reasonableness in providing its employees with safe working conditions.

None of these cases involved specific contentions that the vessel had actively involved itself in the independent contractor's work.[5] Nevertheless, they

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[5] Petitioner has found only one post-*Scindia* decision of a United States Court of Appeals in which the plaintiff expressly relied on the principle, stated in *Scindia*, that the vessel may be liable if it actively involves itself in the cargo operations and negligently injures a longshoreman. In *Melanson* v. *Caribou Reefers, Ltd.*, 667 F.2d 213 (1st Cir. 1981) the court affirmed the district court's summary judgment in favor of the vessel but did so on the apparent ground that the vessel was not negligent. It is of no assistance in determining what is meant by active involvement in the independent contractor's operations.

(Footnote continued)

illustrate the importance of a proper application of the *Scindia* principle that the vessel need not take steps to ensure that the independent contractor follow its own established safety procedures unless the vessel has reason to believe that they will not be followed.

The evidence in this case establishes that it is common for the vessel to have available an "owner's representative" during major repair jobs. The effect of the Ninth Circuit's decision in this case is to read out of the law the shipowner's right to rely on the independent contractor unless the shipowner is willing to turn the job over to the independent contractor and to maintain no relationship with the work — even in liaison capacity — until the independent contractor believes the job is done. If directing the shipyard to accomplish a particuler result can be held to constitute active involvement in the shipyard's work, then the vessel is put at risk of a jury's verdict finding it negligent simply because it maintains an on-board representative. In short, the Ninth Circuit's decision resurrects the doctrine of unseaworthiness by making a vessel owner liable for hazards created by the shipyard.

(Footnote carried forward)

Prior to the *Scindia* decision, the Third Circuit had observed:

> "In the handful of opinions holding the shipowner liable for injuries suffered as a result of improper stevedoring operations, the shipowner's participation in the operations is clear, direct, and of significant proportions. . . ." *Hurst* v. *Triad Shipping Co.*, 554 F.2d 1237, 1252, n. 38 (3rd Cir. 1977).

CONCLUSION

In its decision in *Scindia*, this Court made it clear that the owner of a vessel may rely on an independent contractor's performance of its own duties to its employees, although the vessel may nevertheless be liable if it *actively involves itself* in the independent contractor's operations and negligently injures one of its employees. The United States Court of Appeals has incorrectly applied the second of those principles and, in so doing, has seriously undermined the first. This Court should grant the petition for certiorari and should reverse the decision below.

Respectfully submitted,

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OLGA L. COOK, Personal Representative of the Estate of ROBERT C. COOK, deceased,

Plaintiff-Appellant,

v.

EXXON SHIPPING COMPANY, a Delaware corporation, and HUMBLE OIL & REFINING CORPORATION, a Delaware corporation,

Defendants-Appellees.

No. 84-3995
DC No. CV 82-1335 PA

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

Argued and Submitted March 6, 1985
Decided June 3, 1985

Appeal from the United States District Court for the District of Oregon.

Before KENNEDY and NORRIS, Circuit Judges, and LYNCH,* District Judge.

NORRIS, Circuit Judge:

This is an action against Exxon Shipping Company ("Exxon") for the wrongful death of Robert C.

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* The Honorable Eugene F. Lynch, U.S. District Judge, Northern District of California, sitting by designation.

Cook.[1] Cook's death resulted from injuries suffered as a result of an explosion aboard a vessel owned by Exxon. At the time of the explosion, the vessel was being repaired at Northwest Marine and Ironworks ("NWMI"), and Cook was doing repair work as an employee of NWMI. Appellant Olga L. Cook, who brought this action as personal representative of the estate of her husband, appeals a summary judgment in favor of Exxon.[2] The appeal requires us to consider the duty of care owed by a shipowner to employees of an independent repair company making repairs on a ship.

I

It is not disputed that at the time of the explosion, Cook was covered by the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1982). In *Scindia Steam Navigation Co.* v. *De Los Santos,* 451 U.S. 156 (1981),[3] the Supreme Court

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[1] Appellants named Exxon and Humble Oil & Refining Corporation as parties to this appeal. The July 11, 1984 judgment of the district court names only Exxon as a defendant but states that the entire action is dismissed. Since we construe this judgment as dismissing the entire action, it is an appealable final order under 28 U.S.C. § 1291 (1982).

[2] We review de novo an order granting summary judgment. *Lojek* v. *Thomas,* 716 F.2d 675, 677 (9th Cir. 1983).

[3] In *Scindia,* a longshoreman was struck and injured by sacks of wheat that fell from a pallet suspended by a defective ship's winch. The stevedore had been using the winch for two days

(footnote carried forward)

defined the duty of care owed by a shipowner to a stevedore and his longshoremen under the Act. The court stated:

> "The shipowner thus has a duty with respect to the condition of the ship's gear, equipment, tools, and work space to be used in the stevedoring operations; and if he fails at least to warn the stevedore of hidden danger which would have been known to him in the exercise of reasonable care, he has breached his duty and is liable if his negligence causes injury to a longshoreman . . . It is also accepted that the vessel may be liable if it actively involves itself in the cargo operations and negligently injures a longshoreman or if it fails to exercise due care to avoid exposing longshoremen to harm from hazards they may encounter in areas, or from equipment, under the active control of the vessel during the stevedoring operation."

Scindia, 451 U.S. at 167.

We hold that the duties of care delineated in *Scindia* apply to employees of independent repair companies who are working on a vessel as well as to longshoremen. In so holding, we follow the decision of the Fifth Circuit in *Hill* v. *Texaco, Inc.*, 674 F.2d 447 (5th Cir. 1982), which applied the *Scindia* standards to "any

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(Footnote continued)

prior to the accident despite its malfunction. The longshoreman sued the shipowner under 33 U.S.C. § 905(b), which provides that a longshoreman injured "by the negligence of a vessell . . . may bring an action against such vessel as a third party" and that the vessel's liability "shall not be based upon the warranty of seaworthiness."

independent contractor and its harborworker employees covered by the . . . [Longshoremen's and Harbor Workers' Compensation Act] and working aboard ship." *Id.* at 451. We agree with the Fifth Circuit that there is no reason to limit the Supreme Court's holding in *Scindia* to stevedores.

II

Appellant argues that Exxon is not entitled to summary judgment because the evidence raises genuine issues of material fact with respect to whether Exxon breached its duty of care to Cook under the *Scindia* standards. Specifically, appellant contends that there are triable issues as to whether Exxon failed to warn Cook of a hidden danger on the vessel and whether Exxon actively involved itself in the repair operations, and then negligently caused Cook to be injured.

The evidence presented to the district court in connection with Exxon's motion for summary judgment indicates that the explosion occurred when one of Cook's co-workers cut through the deck of the vessel with a torch and ignited a bunker fuel tank located immediately beneath the deck. There is also evidence that John H. King, Jr., Exxon's repair superintendent, knew the location of the fuel tank. He admitted, moreover, that there were no deck markings that indicated the location of the fuel tanks closer than five or six feet from the point where the pipes penetrated the deck and that he did not tell the NWMI employees that the bunker fuel tank was close to the pipes.

Exxon contends that as a matter of law it satisfied its duty to warn of hidden dangers because of three undisputed facts: (1) it provided NWMI in 1979, three years before the repair work in question, with blue prints that showed the location of the fuel tanks; (2) two people employed by NWMI in positions of responsibility, NWMI's general superintendent and its marine chemist and safety inspector, both had worked on this area of the ship before; and (3) NWMI's general superintendent knew of the location of the fuel tank.

In our view, the evidence cited by Exxon does not establish as a matter of law that Exxon satisfied its duty to warn the workers of a hidden danger. Rather, a trier of fact could reasonably find on the basis of this evidence that Exxon breached its duty to warn.

Appellant also argues that a trier of fact could find on the evidence presented that the work on the vessel was carried out under the direct supervision and orders of King, and that King told the NWMI employees to do "hot work," meaning use of a torch, on the deck. We agree. There is evidence that King, who knew where the fuel tank was located, not only authorized hot work to be performed inches from a bulkhead separating the work area from the bunker fuel tank, but also that he changed the work description from use of an air arc to hot work. An air arc is a device which permits workers to cut a weld without cutting through the deck itself. A trier of fact could find that the workers could have avoided an explosion if they had used an air arc rather than a torch.

Exxon's response to appellant's contention that the work was carried out under the direct supervision of King is that the work was actually carried out under the supervision of NWMI's superintendent. Exxon argues that King merely acted as the representative of the shipowner to ensure that his specifications were carried out. We believe, however, that this does not entitle Exxon to judgment as a matter of law on appellant's claim that Exxon actively involved itself in the repair work in a manner that negligently caused the injury. *See Scindia*, 451 U.S. at 167.

We conclude that based on the evidence before the district court, there are triable issues of fact as to whether the explosion was proximately caused by a breach of duty by Exxon to warn the workers of a hidden danger or by King's direct supervision of the repair work in a negligent manner.

The summary judgment for Exxon is VACATED and the case is REMANDED for further proceedings consistent with this opinion.

OLGA L. COOK, Personal Representative of the Estate of ROBERT C. COOK, deceased,

Plaintiff-Appellant,

v.

EXXON SHIPPING COMPANY, a Delaware corporation, and HUMBLE OIL & REFINING CORPORATION, a Delaware corporation,

Defendants-Appellees.

No. 84-3995
DC No. CV 82-1335 PA

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

Argued March 6, 1985
Decided June 3, 1985
Amended Oct. 10, 1985

Before KENNEDY and NORRIS, Circuit Judges, and LYNCH,* District Judge.

ORDER

We grant in part appellees' petition for rehearing. The previous opinion of this court, reported at 762 F.2d 750 (9th Cir. 1985), is hereby amended as follows:

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* The Honorable Eugene F. Lynch, U.S. District Judge, Northern District of California, sitting by designation.

On page *752*, column *1*, delete the period at the end of the sentence beginning "Specifically, appellant contends . . ." and add the following:

> by failing to exercise due care to avoid exposing the workers to hazards in the area.

On page *752*, column *2*, delete the paragraph beginning "In our view, the evidence cited by Exxon . . ." and substitute the following:

> The evidence is undisputed that Exxon had previously provided the shipyard with plans of the vessel, that the shipyard itself had checked those plans for accuracy, and that the plans showed the relationship between the pipe tunnel and the bunker fuel tank. The evidence is also undisputed that the shipyard had retained those plans, which were available for use by shipyard personnel during the repairs at issue in this case, and that the shipyard's superintendent in charge of this very job and also its marine chemist and safety inspector knew that the pipe tunnel was adjacent to or near the fuel tank. That evidence conclusively established that Exxon had performed its duty to warn the shipyard of the condition of the vessel.

On page *752*, column *2*, delete the period at the end of the sentence beginning "We believe, however, that this does not entitle Exxon . . ." and add the following:

> , and then failed to exercise due care to avoid exposing the workers to hazards in the area.

On page *752*, column *2*, add the following sentence at the end of the paragraph beginning "Exxon's response to appellant's contention . . .":

> We conclude that the evidence before the district court raises a triable issue of fact as to whether the explosion was proximately caused by King's direct supervision of the repair work in a negligent manner.

On page *753*, column *1*, delete the entire paragraph beginning "We conclude that based on the evidence before the district court . . ."

U.S. DISTRICT COURT
DISTRICT OF OREGON
FILED
JUL 10, 1984
ROBERT M. CHRIST, *Clerk*
By *Deputy*

In The United States
DISTRICT COURT
for the District of Oregon

OLGA L. COOK, Personal Representative of the Estate of ROBERT C. COOK, Deceased,		Civil No. 82-1335-PA
Plaintiff,		
v.		OPINION and ORDER
EXXON SHIPPING COMPANY, a Delaware corporation, and HUMBLE OIL & REFINING CORPORATION, a Deleware corporation		
Defendants.		

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Attorneys for Defendants

PANNER, J.

Plaintiff brings this action against defendant Exxon Shipping Company for injuries and wrongful death suffered by decedent while decedent was employed as a firewatch aboard the defendant's vessel Exxon New Orleans. The parties agree that defendant Humble Oil & Refining Corporation was neither owner or operator of the vessel and that it can be dismissed from the action. The ship was being repaired at Northwest Marine and Iron Works (NWMI) pursuant to a contract between NWMI and defendant. Plaintiff was employed by NWMI. The decedent was killed when a co-worker cut through the deck into a bunker fuel tank, causing an explosion.

Plaintiff asserts that defendant was negligent in failing to warn plaintiff that the hot work was to be performed around and over a bunker fuel tank, in permitting such work to be performed, and in permitting such work to be performed in the area when the fuel tank had not been certified as gas free. Plaintiff further argues that defendant was negligent in failing to outline the location of the fuel tanks with markings on the exterior deck of vessel, in failing to require that warnings be posted in the area, and in failing to provide blueprints, drawings or plans which clearly disclosed the location of the fuel tank. Plaintiff contends that defendant was also negligent in failing to adequately determine that the work to be performed lay over a bunker fuel tank, in failing to allow the work

to be performed by another method, and in directing decedent's co-worker as to where to make the cut.

Defendant's motion for summary judgment is GRANTED.

DISCUSSION

I. *Legal Standards.*

Summary judgment is appropriate if the court finds: (1) there is no genuine issue of material fact, and (2) the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party has the burden of establishing the absence of a genuine issue of material fact. *Securities and Exchange Commission* v. *Murphy*, 626 F.2d 633, 640 (9th Cir. 1980). All reasonable doubts as to the existence of a genuine issue of material fact should be resolved against the moving party. *Hector* v. *Weins*, 533 F.2d 429, 432 (9th Cir. 1976). In addition, the inference to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *United States* v. *Diebold*, 369 U.S. 654, 655 (1962).

If the moving party satisfies the initial burden, the burden shifts to the opponent to come forward with specific facts showing that a genuine issue of material fact remains in the case. Fed. R. Civ. P. 56(e); *Neely* v. *St. Paul Fire & Marine Insurance Co.*, 584 F.2d 341, 344 (9th Cir. 1978). An adverse party may not rest upon the mere allegations in his pleadings; he must present the issues of fact in evidentiary form. Fed. R.

Civ. P. 56(e). Legal memoranda and arguments of counsel are not evidence and do not create issues of fact capable of defeating an otherwise valid summary judgment. *Estrella* v. *Brant*, 682 F.2d 814, 819-20 (9th Cir 1982).

The Supreme Court has articulated three general principles to govern the duties of a vessel towards the employees of a stevedore or independent contractor. *Scindia Steam Navigation Co.* v. *De Los Santos*, 451 U.S. 156 (1981); *Hill* v. *Texaco, Inc.*, 674 F.2d 447 (5th Cir. 1982).

(1) Before the stevedore begins his work, a shipowner must exercise ordinary care to make safe the portions of the ship that it turns over to the stevedore. In discharging this duty, the ship may rely on the stevedore to perform its task with reasonable care. The shipowner must warn the stevedore, however, of hidden unsafe conditions on the ship of which the ship is, or should be, aware. 451 U.S. at 166-67.

(2) Once the stevedore begins its operations, the shipowner has no general duty to supervise work or to inspect the area assigned to the stevedore, unless custom, contract or law imposes such a duty on the shipowner. The shipowner is entitled to rely on the stevedore's expertise and reasonableness; it need not monitor the stevedore's operations. 451 U.S. at 171.

(3) There is one exception to the general absence of a duty on the part of the shipowner to protect employees of the stevedore during cargo operations. The

duty arises when two conditions are satisfied. If the shipowner becomes aware during the stevedore's work that the ship or its gear poses a danger to the longshoremen, and if the shipowner also learns that the stevedore is acting unreasonably in failing to protect the longshoremen against the danger, then the shipowner acquires a duty to intervene and protect the longshoremen. The shipowner has knowledge of a defect if the defect develops during the stevedore's operations and the shipowner has actual knowledge, or if the defect exists at the outset and therefore the ship is deemed to have knowledge of it. 451 U.S. at 175-76.

Application of the *Scindia* standards is not limited to situations involving stevedoring operations. The standards apply to "any independent contractor and its harborworking employees covered by the [Longshoremen's and Harbor Workers' Compensation Act] and working aboard ship." *Hill* v. *Texaco*, 674 F.2d at 451. Thus, I apply the *Scindia* standards to the facts of this case, where NWMI contracted with defendent Exxon to perform maintenance and repair work on board the ship.

II. *Analysis.*

A. Existence of a Hidden Defect.

Plaintiff contends that the location of the bunker fuel tanks constitute a hidden danger and that therefore defendant was obligated to warn plaintiff of their location. The facts are undisputed, however, NWMI had worked on the ship on at least two other occasions,

and defendant had given NWMI blueprints of the ship in 1979 that showed the fuel tanks. Both NWMI's ship superintendent and marine chemist had worked on this area of the ship before. It is also undisputed that before performing hot work on a main deck, a worker must determine, from below, precisely where the hot work will penetrate the deck. No such determination was made in this instance.

Plaintiff has offered no evidence of a genuine issue of material fact on the question of defendant's failure to warn plaintiff of hidden defect. Plaintiff does not contend that defendant violated the other duties outlined in *Scindia*. The evidence establishes that defendant is entitled to summary judgment on this issue.

B. Defendant Actively Involved Itself In The Work.

Plaintiff argues that defendant's representative for the repair job, Jack King, actively participated in NWMI's work by deciding how to accomplish the specific task in question. Plaintiff contends that this active interference constitutes actionable negligence.

This court has interpreted the *Scindia* decision to place a duty upon the shipowner to exercise reasonable care if he or she remains actively involved in the stevedore or repair operations. *Landsen* v. *Isuzu Motors Ltd.*, 534 F. Supp. 448 (D. Or. 1982). But there is a material difference between the owner telling the repair yard a result to be accomplished by the repairs and the owner outlining specifically the manner in which the repairs are to be done.

Even construing all inferences in favor of the plaintiff, the statements made by Mr. King to the NWMI employees simply that he wanted them to save the doubler. This is particularly so where the repair people were required to conform to certain normal safety precautions prior to beginning the work.

Simply advising a worker of the result to be accomplished does not constitute active involvement with the repair work. Plaintiff has raised no genuine issue of material fact, and there is nothing more to indicate defendant's active involvement with the repair.

CONCLUSION

There is no genuine issue of material fact. Defendant is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56(c).

IT IS SO ORDERED.

DATED this 10 day of July, 1984.

/S/

OWEN M. PANNER
United States District Judge

FILED
NOV 21 1985
CLERK, U.S. COURT OF APPEALS

United States
COURT OF APPEALS
for the Ninth Circuit

OLGA L. COOK, Personal Representative of the Estate of ROBERTT C. COOK, Deceased,	)	
Plaintiff-Appellant,	)	No. 84-3995
	)	DC No.
v.	)	CV 82-1335 PA
EXXON SHIPPING COMPANY, a Delaware corporation, and HUMBLE OIL & REFINING CORPORATION, a Deleware corporation	)	ORDER
Defendants-Appellees.	)	

Before: KENNEDY and NORRIS, Circuit Judges; and LYNCH,* District Judge.

The appellees' petition for rehearing is granted in part and the suggestion for rehearing en banc is denied. The petition has been circulated to the full court and no judge has requested that the case be reheard en banc. Fed. R. App. P. 36(b).

* The Honorable Eugene F. Lynch, U.S. District Judge, Northern District of California, sitting by designation.

NORRIS, Circuit Judge:

This is an action against Exxon Shipping Company ("Exxon") for the wrongful death of Robert C. Cook.[1] Cook's death resulted from injuries suffered as a result of an explosion aboard a vessel owned by Exxon. At the time of the explosion, the vessel was being repaired at Northwest Marine and Ironworks ("NWMI"), and Cook was doing repair work as an employee of NWMI. Appellant Olga L. Cook, who brought this action as personal representative of the estate of her husband, appeals a summary judgment in favor of Exxon.[2] The appeal requires us to consider the duty of care owed by a shipowner to employees of an independent repair company making repairs on a ship.

I.

It is not disputed that at the time of the explosion, Cook was covered by the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1982). In *Scindia Steam Navigation Co.* v. *De Los*

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[1] Appellants named Exxon and Humble Oil & Refining Corporation as parties to this appeal. The July 11, 1984 judgment of the district court names only Exxon as a defendant but states that the entire action is dismissed. Since we construe this judgment as dismissing the entire action, it is an appealable final order under 28 U.S.C. § 1291 (1982).

[2] We review de novo an order granting summary judgment. *Lojek* v. *Thomas*, 716 F.2d 675, 677 (9th Cir. 1983).

Santos, 451 U.S. 156 (1981),[3] the Supreme Court defined the duty of care owed by a shipowner to a stevedore and his longshoremen under the Act. The court stated:

> "The shipowner thus has a duty with respect to the condition of the ship's gear, equipment, tools, and work space to be used in the stevedoring operations; and if he fails at least to warn the stevedore of hidden danger which would have been known to him in the exercise of reasonable care, he has breached his duty and is liable if his negligence causes injury to a longshoreman . . . It is also accepted that the vessel may be liable if it actively involves itself in the cargo operations and negligently injures a longshoreman or if it fails to exercise due care to avoid exposing longshoremen to harm from hazards they may encounter in areas, or from equipment, under the active control of the vessel during the stevedoring operation."

Scindia, 451 U.S. at 167.

We hold that the duties of care delineated in *Scindia* apply to employees of independent repair companies who are working on a vessel as well as to longshoremen. In so holding, we follow the decision of the Fifth Cir-

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[3] In *Scindia*, a longshoreman was struck and injured by sacks of wheat that fell from a pallet suspended by a defective ship's winch. The stevedore had been using the winch for two days prior to the accident despite its malfunction. The longshoreman sued the shipowner under 33 U.S.C. § 905(b), which provides that a longshoreman injured "by the negligence of a vessel . . . may bring an action against such vessel as a third party" and that the vessel's liability "shall not be based upon the warranty of seaworthiness."

cuit in *Hill* v. *Texaco, Inc.*, 674 F.2d 447 (5th Cir. 1982), which applied the *Scindia* standards to "any independent contractor and its harborworker employees covered by the . . . [Longshoremen's and Harbor Workers' Compensation Act] and working aboard ship." *Id.* at 451. We agree with the Fifth Circuit that there is no reason to limit the Supreme Court's holding in *Scindia* to stevedores.

II.

Appellant argues that Exxon is not entitled to summary judgment because the evidence raises genuine issues of material fact with respect to whether Exxon breached its duty of care to Cook under the *Scindia* standards. Specifically, appellant contends that there are triable issues as to whether Exxon failed to warn Cook of a hidden danger on the vessel and whether Exxon actively involved itself in the repair operations, and then negligently caused Cook to be injured by failing to exercise due care to avoid exposing the workers to the hazards in the area.

The evidence presented to the district court in connection with Exxon's motion for summary judgment indicates that the explosion occurred when one of Cook's co-workers cut through the deck of the vessel with a torch and ignited a bunker fuel tank located immediately beneath the deck. There is also evidence that John H. King, Jr., Exxon's repair superintendent, knew the location of the fuel tank. He admitted, moreover, that there were no deck markings that indicated

the location of the fuel tanks closer than five or six feet from the point where the pipes penetrated the deck and that he did not tell the NWMI employees that the bunker fuel tank was close to the pipes.

Exxon contends that as a matter of law it satisfied its duty to warn of hidden dangers because of three undisputed facts: (1) it provided NWMI in 1979, three years before the repair work in question, with blue prints that showed the location of the fuel tanks; (2) two people employed by NWMI in positions of responsibility, NWMI's general superintendent and its marine chemist and safety inspector, both had worked on this area of the ship before; and (3) NWMI's general superintendent knew of the location of the fuel tank.

The evidence is undisputed that Exxon had previously provided the shipyard with plans of the vessel, that the shipyard itself had checked those plans for accuracy, and that the plans of vessel showed the relationship between the pipe tunnel and the bunker fuel tank. The evidence is also undisputed that the shipyard had retained those plans, which were available for use by shipyard personnel during the repairs at issue in this case, and that the shipyard's superintendent in charge of this very job and also its marine chemist and safety inspector knew that the pipe tunnel was adjacent to or near the fuel tank. That evidence conclusively established that Exxon had performed its duty to warn the shipyard of the condition of the vessel.

Appellant also argues that a trier of fact could find on the evidence presented that the work on the vessel was carried out under the direct supervision and orders of King, and that King told the NWMI employees to do "hot work," meaning use of a torch, on the deck. We agree. There is evidence that King, who knew where the fuel tank was located, not only authorized hot work to be performed inches from a bulkhead separating the work area from the bunker fuel tank, but also that he changed the work description from use of an air arc to hot work. An air arc is a device which permits workers to cut a weld without cutting through the deck itself. A trier of fact could find that the workers could have avoided an explosion if they had used an air arc rather than a torch.

Exxon's response to appellant's contention that the work was carried out under the direct supervision of King is that the work was actually carried out under the supervision of NWMI's superintendent. Exxon argues that King merely acted as the representative of the shipowner to ensure that his specifications were carried out. We believe, however, that this does not entitle Exxon to judgment as a matter of law on appellant's claim that Exxon actively involved itself in the repair work in a manner that negligently caused the injury and then failed to exercise due care to avoid exposing the workers to hazards in the area. *See Scindia.* 451 U.S. at 167.

We conclude that the evidence before the district court raises a triable issue of fact as to whether the

explosion was proximately caused by King's direct supervision of the repair work in a negligent manner.

The summary judgment for Exxon is VACATED and the case is REMANDED for further proceedings consistent with this opinion.